

FOIA MEETING GUIDE

for

**Information Technology Management
Office**

&

State Procurement Office

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HOW TO COMPLY WITH FOIA IN CONDUCTING RFP EVALUATION PANEL MEETINGS

**This document does not create a binding procedure or
create rights or obligations for or against the state.**

Guidelines for RFP Evaluation Panels¹

A. Meeting - Is a Meeting Required?

The Procurement Code does not require multiple evaluators. Likewise, the Procurement Code does not require that the evaluators function collectively, as a panel or advisory body. Rather, the responsible procurement officer may seek advice from numerous individuals without conducting a meeting.² However, if the evaluators act in a collective manner, e.g., meeting to discuss the proposals as part of the evaluation, the Procurement Officer should ordinarily treat the evaluators as an "advisory body" subject to FOIA's meeting rules³ and hold meetings as reflected in this document. If a meeting is held, FOIA's requirements apply if the meeting involves a quorum or simple majority of the evaluators. Remember, a "meeting" includes telephone conference calls or any other form of electronic communication.

B. Posting Advance Notice: Notice of a meeting must be posted.

1. When Required: As a general rule, a notice must be posted for a meeting if a simple majority of the evaluators will attend the meeting. If a meeting concludes, ends, breaks, or adjourns for any reason, a separate notice must be posted for any subsequent meeting. However, a new notice is not required if the meeting is simply a continuation of a meeting that began at the same location on the same day or on the preceding business day. In other words, no new notice is necessary if you take a break for lunch or recess for the evening or weekend. The meeting notice requirements apply regardless whether the entire meeting takes place in executive session or not.

2. When Posted: As early as is practicable, but no later than twenty-four hours before the meeting, notice of the meeting must be posted.

3. Where Posted: Notice must be posted either in the office of the procurement officer responsible for the solicitation or on a centralized web page established for this purpose.

4. What Gets Posted: The notice must identify the solicitation by name and number, state the date, time, and place of the meeting, and provide an agenda. The agenda need only identify the overall topics to be discussed. As a practical matter, the notice should reflect the date it was posted.

¹ This guide does not yet address the applicability of FOIA's meeting rules to a panel evaluating responses to an RFQ. The guidelines for an RFP evaluation panel are equally applicable to a panel evaluating responses to a best value bid.

² S.C. Code Ann. § 11-35-1530(5) & (7).

³ FOIA's definition of the phrase "public body" includes "advisory committees." S.C. Code Ann. § 30-4-20(a). The South Carolina Supreme Court has characterized RFP evaluation committees as advisory bodies subject to FOIA's meeting rules. Quality Towing, Inc. v. City of Myrtle Beach, 547 S.E.2d 862 (S.C. 2001).

5. Direct Notice: If anyone asks to be notified of an upcoming meeting, send them notification (letter, e-mail, or phone call) at the time notice is posted. If meeting notices are posted on a centralized web page, you may explain to them where to access such notice on the internet and ask that they withdraw the request and monitor the website. If they do not withdraw the request, you must provide them the requested notice.

C. Meeting Minutes

1. Basic Rule: FOIA requires that all public bodies keep written minutes of all their public meetings. *Meeting minutes of executive session are not required.*

2. Contents: Meeting minutes must include (1) the date, time, and place of the meeting; (2) the presence or absence of members of the public body; (3) the "substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken"; (4) "[a]ny other information that any member of the public body requests be included or reflected in the minutes;" and (5) any efforts to comply with a request for direct notification allowed by section 30-4-80(e). S.C. Code Ann. §§ 30-4-80(e) & -90(a). *Recommendation:* Also include a statement regarding how notice of the meeting was provided to the public.

3. Releasing Meeting Minutes:

a. Practical Matters: Meeting minutes need not be approved by the evaluators. As the responsible procurement officer always attends any meeting of the evaluators, the procurement officer should keep the minutes. Examples of meeting minutes are attached.

b. What to Release: If the minutes contain information obtained from an offeror's proposal, redact⁴ the minutes prior to release. Reference as an attachment to the minutes any score sheets submitted to you by the evaluators. [Score sheets, if any, are ordinarily not released prior to contract formation. See § 30-4-40(5).]

c. When to Release: Release meeting minutes to the public only after the notice of intent to award is posted.

d. Walk In Requests: If a person visits the procurement office of a state entity that issued the solicitation, that person is entitled to review - upon request - the minutes for any meetings held within the last six months. Nevertheless, meeting minutes are not released to the public until after the notice of intent to award is posted. One possible way to comply with this requirement would be for procurement offices to maintain recent meeting minutes either in a loose-leaf binder in its lobby or on a centralized web page.

⁴ The term "redact" means to edit out. The term is used as a shorthand for editing out any information that must be removed before a document is released to another. You may redact text by blacking it out.

D. The Meeting - Public Access

Note: The following process is designed around two steps. The first step is a meeting for charging the evaluators and distributing the proposals. The second step is a meeting for the evaluators to discuss the proposals and submit their score sheets. This process also assumes that each evaluator completes some type of score sheet. If you vary this process, consult with legal counsel.

1. The Rules:

Step #1 – Charging the Panel

Convene the meeting in public. Do not identify the evaluators by last name. In accordance with your normal process, instruct the panel regarding the evaluation process, confidentiality and conflict-of-interest requirements, then hand out any instruction and forms. Then, make a motion to go into executive session.

After the motion is approved by a majority of evaluators, announce (a) that the panel is going into executive session, (b) that the matters to be discussed are incident to a proposed contractual arrangement, and (c) that the panel will discuss all the proposals received in response to the solicitation and then adjourn to review the proposals individually. The Panel may adjourn without leaving executive session.⁵

Excuse the public, **then** hand out proposals. After distributing the proposals, adjourn, i.e., dismiss the evaluators.

Step #2 – Meeting to Discuss & Score

Convene the meeting in public. Do not identify the evaluators by last name. In accordance with your normal process, provide the panel any routine instructions regarding the evaluation process, the purpose of the meeting, and any applicable confidentiality and conflict-of-interest requirements. Then, make a motion to go into executive session.

After the motion is approved by a majority of evaluators, announce (a) that the panel is going into executive session, (b) that the matters to be discussed are incident to a proposed contractual arrangement, (c) that the panel will discuss the proposals received in response to the solicitation, and (d) that the panel will, at the conclusion of their discussions, return to public session.

After you excuse the public, begin any discussions. Once discussions are complete, have the panel complete their score sheets and resolve any questions they may have. Ask the Panel not to sign their score sheets at that time. Once all score sheets are complete, vote to return to public session and allow public attendance.

⁵ S.C. Code Ann. § 30-4-70(b) ("No action may be taken in executive session except to (a) adjourn or (b) return to public session.").

Once in public session, ask the evaluators to sign their score sheets and submit them to you. An open roll-call or other oral action by the evaluators is not required.⁶ In the public meeting, do not announce the evaluators' scores or the ranking of offerors. At public meetings, do not discuss any information appearing in an offeror's proposal. You need not tally the scores or, if applicable, add in the scores for cost. In your discretion, the Procurement Officer *may* elect to announce only the name of the highest ranking offeror. Ordinarily, do not.

2. In any meeting, if the evaluators reconvene after a break, a new, public vote must be taken to enter executive session if a new meeting notice is required. See paragraph B.1. above regarding when a new meeting notice is required.

3. Public Participation - Recording: Allow anyone to record by any means any aspect of any public portions of a meeting. Do not allow the process of recording to interfere with the meeting. Neither questions nor public participation should be allowed.

⁶ In Fowler v. Beasley, 472 S.E.2d 630 (S.C. 1996), the South Carolina Supreme Court considered the legality of action taken by the Charleston County Legislative Delegation. By statute, the delegation was required to recommend to the governor a person to fill an opening on the county school board. To accomplish this, the Delegation, at a properly noticed meeting, accomplished its statutory duty by "sending around a 'sign-up' sheet at a meeting of the Delegation." *Id.* at 633. Plaintiff citizens objected that the "sign-up" sheet did not comply with FOIA and that the "vote" had to be made by an open roll call. As the following explanation reflects, the Court rejected this argument.

We find the circulation of a letter, at an open, public meeting, at which each individual member signs his recommendation is in compliance with subsection six. So long as the vote is taken at an open public meeting, and the public is able to glean the results and how each member voted, there is no FOIA violation.

Id. at 634.